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MICHAEL ROBAK, JR.

# Supreme Court of the United States

**October Term, 1973**

**No. 73-327**

STATE OF OHIO *ex rel.*, RONNIE WOODBURY and THOMAS WOODBURY,
*Petitioners,*

vs.

DANIEL T. SPITLER,
Prosecuting Attorney of Wood County, Ohio,
*Respondent.*

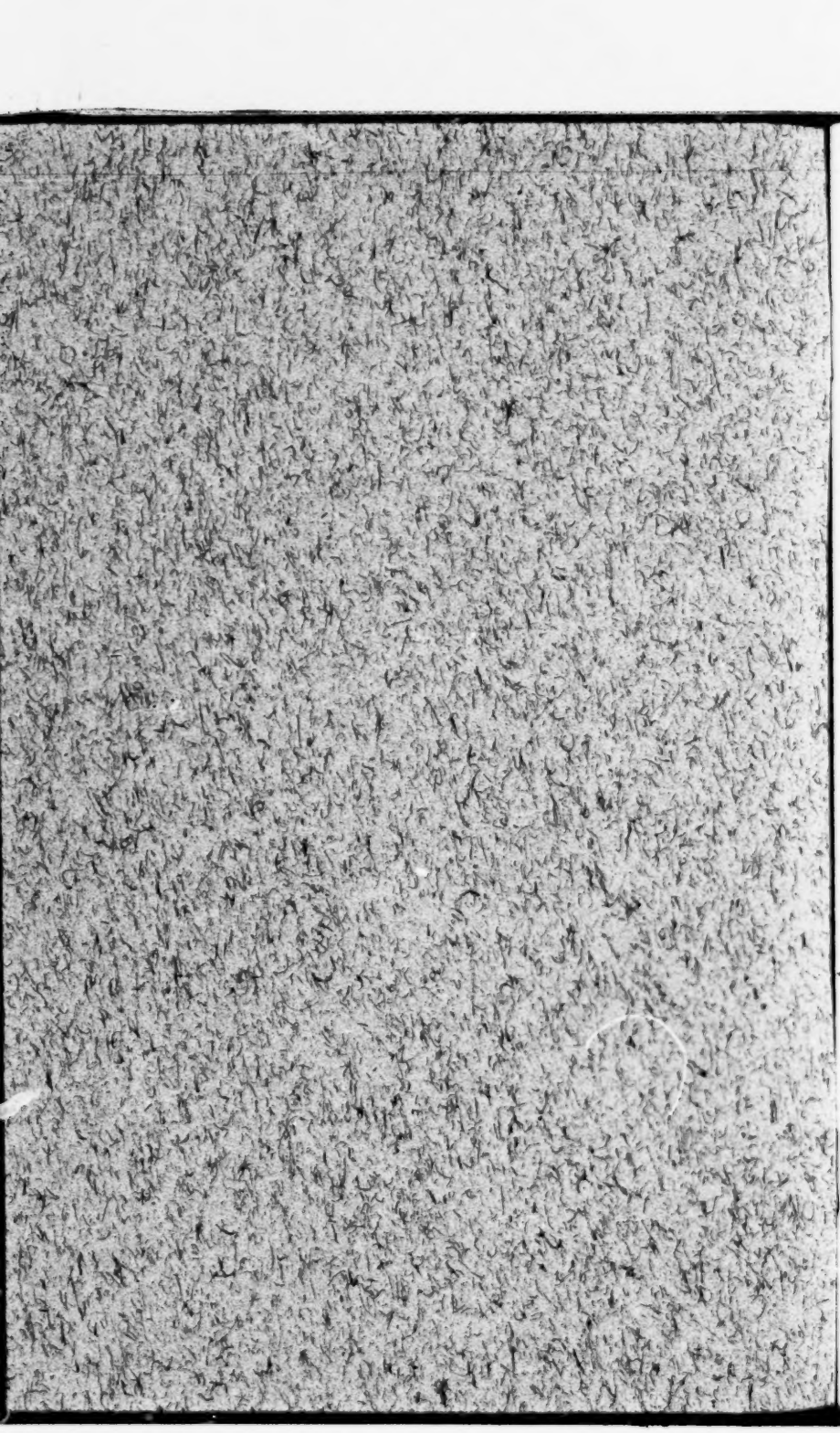
ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

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*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## BRIEF OF RESPONDENT IN OPPOSITION

### STATEMENT OF FACTS

On December 21, 1970, the petitioners, Ronnie Woodbury and Thomas Woodbury agreed to plead guilty to one count of a multi-count indictment then pending against them and to cooperate with the prosecutor in the further investigation of corruption within the Bowling Green Police Department. In consideration of this promise, the prosecutor, the respondent herein, agreed to *nolle prosequi* the other counts in the indictment after the petitioners had plead guilty and been sentenced. (The respondent prosecutor's practice was to *nolle prosequi* only after sentencing in order to prevent a fraud on the prosecutor's

office by a defendant who would withdraw his guilty plea after the other charges have been dropped).

On December 31, 1970, the petitioners' attorney sent Judge Coller a letter (see Exhibit A) allegedly "confirming" the agreement made between the petitioners' attorney and the respondent. Subsequently, the petitioners each pleaded guilty to a single charge of receiving stolen property on January 4, 1971. On January 5, 1971, Judge Coller received the letter mentioned before. Judge Coller, on February 1, 1971, withdrew petitioners' guilty pleas on his own motion. (See Exhibit B.)

On March 4, 1971, the cases involving the petitioners were transferred by Judge Coller to Judge Kenneth Adams also of the Wood County Ohio Common Pleas Bench. Subsequently, the petitioners refused to plead guilty to the one count as agreed in the original bargain. Three months after the transfer, the court orderd that all counts of the original indictment against the petitioners be set down for trial on July 20, 1971.

Since July of 1971, petitioners have sought both a writ of prohibition and a writ of mandamus (the origin of this action) in order to force the respondent to drop the charges against the petitioners.

## REASONS FOR DENYING THE WRIT

**1. The Respondent, as Prosecuting Attorney for Wood County, Ohio, stands ready and willing to fulfill his part of the original bargain. Therefore, Petitioner's rights under Santobello are not violated.**

In *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), this court held that if a prosecutor failed to perform his promises under an agreement with the defendant for a guilty plea, the state court should grant

the defendant either "specific performance of the agreement" or "the opportunity to withdraw his plea of guilty." 404 U.S. at 263.

It is the state's position that the facts in this case have not developed to the point where *Santobello* is controlling. The petitioners have not in effect plead to anything. They did plead guilty to one count of the indictment, but the trial court, in its discretion and on its own motion, set aside these pleas because they "were not voluntary and made with full knowledge of all the facts and law." (Exhibit B, p. 3).

The petitioner suggests that the only relief sought is specific performance of the original bargain. The respondent must point out that he has been continually ready and willing to uphold his promise if and when the petitioners plead guilty to the agreed charge and are sentenced thereunder. (See Exhibit C which is an affidavit submitted by the respondent in the original suit for a writ of prohibition brought by the petitioners.) Also, it must be pointed out to the court that one of the petitioners' original co-defendants did plead guilty as per this agreement, and the other counts against that defendant were dropped. (See Exhibits D, E, F, and G.)

Lastly, at to *Greene v. United States,* 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), the respondent agrees that the Fifth Amendment to the United States Constitution does protect an individual from the hardships of trial and possible conviction more than once for an alleged offense. However, the petitioners have never been to trial in these cases. The petitioners, by means of this petition and other previous pre-trial motions, have prevented this case from coming on trial for more than two years. The petitioners do not seek to prevent double jeopardy; they seek to prevent any jeopardy whatsoever.

**2. The Petitioners have not exhausted their state remedies.**

The respondent does not quarrel with the petitioners' argument that if the prosecutor refuses to perform as agreed in the original bargain that the petitioners' constitutional rights will be violated. However, the facts of this case readily point out that the prosecuting attorney cannot breach this agreement until the petitioners plead guilty to the one count in the original agreement. (Until they do, the respondent has a duty to continue prosecuting these cases until they are resolved.) If, after submitting their pleas of guilty and being sentenced, the respondent did not *nolle prosequi* the other counts, the petitioners would have the remedy of moving to quash the remaining indictments.

Also, for this court to render an opinion on this question before the petitioners have pleaded and the prosecutor has breached, would be to render the petitioners an advisory opinion as to what their rights *may be if* the respondent fails to perform as he promised. Clearly, this raises a non-justiciable question for which the petitioners have no standing.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL T. SPITLER
*Prosecuting Attorney*
*Wood County, Ohio*

**EXHIBIT A**

HANNA, MIDDLETON & ROEBKE
Bowling Green, Ohio 43402

December 31, 1970

The Hon. Floyd A. Coller
Common Pleas Court
Wood County Court House
Bowling Green, Ohio 43402

RE: State vs. Ronnie Woodbury, No. 5790
State vs. Ronnie Woodbury, No. 5791
State vs. James Falls, No. 5792
State vs. Thomas Woodbury, No. 5793

Dear Judge Coller:

In regard to the above captioned cases, this is to confirm the previous understanding between you, I, and Daniel T. Spitler, Wood County Prosecutor, as to the imposition of sentences.

In this respect, Ronnie Woodbury is to plead guilty to one felony, to-wit: receiving stolen property, and the remaining three counts of receiving stolen property are to be dismissed at the request of the prosecutor. In addition, Mr. Woodbury is to be sentenced to the Ohio State Reformatory and will be released from that institution and placed on probation by you approximately six months after he has entered his foregoing plea of guilty and that in furtherance of this, I am to file a Motion for "shock" probation.

In regard to James Falls, he is to enter a plea of guilty to one count of breaking and entering an uninhabited dwelling in the nighttime, and the remaining similar account is to be dismissed at the request of the prosecutor.

In return, Mr. Falls is to be sentenced to the Ohio State Reformatory and that you will release him approximately eight (8) months after entering the foregoing plea of guilty upon my filing the appropriate motion for "shock" probation.

In regard to Thomas Woodbury, he is to enter a plea of guilty to one charge of breaking and entering an uninhabited dwelling in the nighttime and the remaining two similar accounts are to be dismissed by the request of the prosecutor. In return, Mr. Woodbury is to be sentenced to the Ohio State Penitentiary and is to be released approximately eight (8) months after entering the foregoing plea upon my filing the appropriate motion for "shock" probation.

It is further understood that Ronnie Woodbury, James Falls, and Thomas Woodbury will cooperate with and assist the office of the Wood County Prosecutor in furtherance of obtaining convictions against other law enforcement officials involved in the foregoing offenses or similar offenses in Wood County, Ohio. In this respect, it is understood that there will be no further prosecution commenced or indictments retained against Ronnie Woodbury, James Falls, or Thomas Woodbury, arising or connected directly or indirectly out of their cooperation with the Wood County Prosecutor's Office.

It is further understood that these defendants shall pay the costs of these proceedings and that based upon their cooperation, you will consider at a later date their possible earlier release than has been indicated heretofore, but that no specific promise is made in this respect.

In sentencing the foregoing defendants, it is understood that you shall recommend to the respective institution that the defendant being sentenced there be trans-

ferred to one of the honor institutions under the control of the Ohio State Correctional Authority.

Cordially yours,

HANNA, MIDDLETON & ROEBKE
M. SHAD HANNA
Attorney for Ronnie Woodbury, James Falls and Thomas Woodbury

cc: MR. DANIEL T. SPITLER
Wood County Prosecuting Attorney

## EXHIBIT B

(Certification of copy omitted in printing)

Nos. 5791, 5792, and 5793

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

---

STATE OF OHIO
*Plaintiff,*

vs.

THOMAS WOODBURY, RONNIE WOODBURY, JAMES FALLS,
*Defendants.*

---

The above-captioned cases came on for hearing on setting aside the pleas on Monday, February 1, 1971, at 3:16 p.m., before the Hon. Floyd A. Coller, Judge of the above-court.

APPEARANCES:

DANIEL SPITLER, ESQ.
Prosecuting Attorney
Court House
Bowling Green, Ohio 43402
M. SHAD HANNA, ESQ.
161 North Main Street
Bowling Green, Ohio 43402

The Court: Case of State of Ohio against Ronnie Woodbury, Number 5791, State of Ohio against James Falls, Number 5792, State of Ohio against Thomas Woodbury, Number 5793. You may all three stand up.

Gentlemen, on January the 5th, 1971, I received by certified mail a letter from your attorney, which has disturbed me for some time, which I debated and considered for some time just what I should do about it. This letter stated in part, "in regard to the above-captioned cases, this

is to confirm the previous understand between you, I and Daniel Spitler, Wood County Prosecutor, as to the imposition of sentences." The letter then sets forth in separate paragraphs what your attorney apparently believed I had agreed I would do if each of you plead guilty to the charges in certain counts in the above-numbered cases.

I am therefore afraid that each of you, when you entered your plea and even now, may believe that I made certain promises as to just what would happen if you plead guilty. I wish to inform you now and I can't be too emphatic about it, that I did not, cannot, never have and will not promise any person, when he offers to plead guilty what the results as to his sentence, probation or any other results will be.

The only person who has a right to do what is called plea-bargaining is the Prosecuting Attorney. He can guarantee you nothing. He cannot bind this Court or any Court as to what the Court will do after a plea. He can and often does make recommendations to the Court. He can agree with your attorney or you that he will make certain recommendations. He cannot and does not pledge to your attorney, you or anyone else that the Court will follow all or any of his recommendations.

I will say this, that the Court has and often does follow his recommendations; but until the Court has acquainted himself with all the facts of the case, has received a report from the probation officer and so forth, he cannot and does not say whether he will probate any defendant, sentence him or release him on shock treatment at a later date.

From that letter, I take it that your attorney may have thought that the Prosecuting Attorney or perhaps even I was guaranteeing each of you just what would happen to you if you plead guilty. I would only account it to inexperience on the part of your attorney for I ques-

tion whether he would do it intentionally. He should know that anything the Prosecuting Attorney would say when discussing the cases with him would not bind the Court and that any conversations that may have taken place in the presence of the Court between himself and the Prosecuting Attorney cannot—can in no way be taken as an understanding or an agreement between the Court, himself and the Prosecuting Attorney.

For that reason, I have come to the conclusion that perhaps your pleas were not voluntary and made with full knowledge of all the facts and law. I am therefore at this time setting aside your former pleas of guilty in each of your cases and counts to which you formerly plead guilty. I want you to consult with your attorney or any other attorney, if you so choose; and at a later date, I will bring you back for rearraignment upon the indictments and your answers on the matter of your pleas.

This applies to each of you individually and you're now released to the jail for rearraignment at a later date.

Mr. Hanna: Your Honor, in this respect—

The Court: Just a minute. I haven't asked for any question. You heard what I said.

Mr. Hanna: I think they are entitled to bond if you're setting aside—

The Court: They are entitled to bond.

Mr. Hanna: We would request the same bond as before.

The Court: They can make that request, yes.

Mr. Hanna: They are making it now for the same bond that was set before.

The Court: The bond will be fixed as before.

Mr. Hanna: Thank you, your Honor.

The Court: They may be remanded to jail.

(At this time the hearing ended. 3:23 p.m.)

(Certificate of Reporter omitted in printing)

**EXHIBIT C**

No. 5790

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

---

STATE OF OHIO

vs.

RONNIE WOODBURY

AFFIDAVIT

(Filed October 11, 1972)

State of Ohio,
County of Wood, ss:

Daniel T. Spitler, Prosecuting Attorney of Wood County, Ohio, being first duly sworn on oath deposes and says that Ronnie Woodbury was indicted by the September 1970 Term of the Wood County Grand Jury on four counts of receiving stolen property, which are the charges contained in cases numbered 5790 and 5791.

Affiant further states that he and counsel for the defendant, M. Shad Hanna, entered into plea bargaining with the result that the defendant, Ronnie Woodbury, was to plead guilty to one count of the two indictments and after sentencing of Ronnie Woodbury, affiant agreed to file a motion with the Court to nolle prosequi the remaining three counts in cases numbered 5790 and 5791.

Affiant further states that he will comply with all the provisions of the plea bargaining agreement which were set forth in a letter dated December 31, 1970, from M. Shad Hanna, attorney for defendant, Ronnie Woodbury,

to the Honorable Floyd A. Coller, Judge of the Common Pleas Court, Wood County, Ohio; a copy of the letter is attached to this affidavit and made Exhibit "A".

Affiant further states that the State of Ohio is prepared to proceed with prosecution of cases numbered 5790 and 5791 and will not use as evidence against the defendant any statements or admissions or evidence resulting from such statements or admissions given by the defendant to the prosecution as a result of plea bargaining.

Affiant further states that this affidavit is filed with this Court pursuant to a mandate of the Ohio Supreme Court in the case of *State of Ohio, ex rel, Woodbury, et al, v. Coller, et al,* (1972) 31 Ohio St. 2d 195.

Further affiant saith not.

/s/ DANIEL T. SPITLER,
*Affiant*
(Jurat omitted)

**EXHIBIT D**

(Certification of copy omitted in printing)

No. 5792

IN THE COMMON PLEAS COURT
OF WOOD COUNTY, OHIO

---

STATE OF OHIO

vs.

JAMES FALLS

---

PLEA OF GUILTY

I, James Falls, defendant in the above cause, being now in open court and having been fully advised by the court of my rights under the Constitutions of the United States and the State of Ohio, and the laws of this State, and that such plea constitutes an admission which may be used against me at a later trial, and recognizing my right to a trial by jury, and receiving no promise in return for my plea, and having been fully informed by my counsel and by the Court of the charge against me, do hereby:

* * * * *

2. Waive my right to a trial by jury and withdraw my former plea of not guilty to the count of the indictment and enter a plea of guilty to O.R.C. §2907.10 (Breaking and Entering), first count only.

I have been advised that the penalty for this offense is (are) 1-15 years.

Dated this 2 day of December, 1971.

/s/ JAMES FALLS
*Defendant*

Signed in the presence of:
/s/ KENNETH H. ADAMS
*Judge*

*Prosecuting Attorney*
/s/ ROBERT W. MAURER
/s/ M. SHAD HANNA

**EXHIBIT E**

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO

vs.

JAMES FALLS

JOURNAL ENTRY
December 2, 1971

This day came Robert W. Maurer, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna.

Thereupon said defendant withdrew his plea of not guilty to the first count of said indictment, heretofore entered herein and was rearraigned on said indictment.

The court thereupon advised the defendant of the status of the charge against him and advised the defendant of his state and federal constitutional rights. Thereupon the Assistant Prosecuting Attorney moved pursuant to Ohio Revised Code Section 2941.30 and 2941.08 that the indictment in this cause be amended to read that the offense occurred on August 23, 1970 on both counts thereof. Defendant by and through his attorney consented to the said amendment.

The Court having advised the defendant of his right to a jury trial pursuant to Section 2945.05 of the Ohio Revised Code, and the defendant in writing waived the same.

The Court then advised the defendant of his further constitutional rights and of the consequences of a plea of guilty and then asked the defendant to plead to the indictment, and for plea, defendant says he is guilty as charged, to the first count.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this matter be referred to the Probation Officer for pre-sentence investigation and report. It is further ordered, that the bond be continued and the defendant released until further notice from the court.

/s/ KENNETH H. ADAMS
*Common Pleas Judge*

Approved:
/s/ ROBERT W. MAURER
/s/ M. SHAD HANNA

## EXHIBIT F

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO
vs.
JAMES FALLS

JOURNAL ENTRY
January 10, 1972

This day came Peter D. Gwyn, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna. This matter was then heard on the report of the Probation Officer.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that sentence be deferred and that the defendant be placed on probation for a period of 2 years. The terms of said probation shall be that said defendant have no association with Howard Lashuay, James Beaupre, Ronnie Woodbury, Thomas Woodbury, and Matthew Brichta and pay the costs of this prosecution.

It is further ordered that said bond for defendant's appearance be released.

/s/ KENNETH H. ADAMS
*Common Pleas Judge*

DANIEL T. SPITLER
*Prosecuting Attorney,*
/s/ DANIEL T. SPITLER

**EXHIBIT G**

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO
vs.
JAMES FALLS

JOURNAL ENTRY
January 10, 1972

This day came Robert W. Maurer, Assistant Prosecuting Attorney on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna.

This matter then came on for consideration of an oral motion of the Prosecuting Attorney for a nolle prosequi to the second count as stated in the indictment, and the Court, being fully advised in the premises, finds said motion well taken and the second count is hereby ordered nollied by the Court.

/s/ KENNETH H. ADAMS
*Common Pleas Judge*

DANIEL T. SPITLER
*Prosecuting Attorney,*
/s/ ROBERT W. MAURER

